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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ZELENY, an individual,

Plaintiff,

v.

**GAVIN NEWSOM, an individual, in his
official capacity; XAVIER BECERRA, an
individual, in his official capacity; CITY OF
MENLO PARK, a municipal corporation;
and DAVE BERTINI, in his official
capacity,**

Defendants.

3:17-cv-07357 RS (TSH)

**[PROPOSED] ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT
BY CALIFORNIA ATTORNEY
GENERAL XAVIER BECERRA**

Date: February 25, 2021
Time: 1:30 p.m.
Dept: Courtroom 3, 17th Floor
Judge: The Honorable Richard G.
Seeborg
Trial Date: None set
Action Filed: 12/28/2017

1 The motion for summary judgment filed by Defendant Xavier Becerra, in his official
2 capacity as Attorney General of the State of California (“Defendant”), came on for hearing in this
3 Court on February 25, 2021 at 1:30 p.m. Deputy Attorney General John W. Killeen appeared on
4 behalf of Defendant. David W. Affeld, Esq. and Damion Robinson, Esq. of Affeld Grivakes LP
5 appeared on behalf of Plaintiff and opposing party Michael Zeleny. After considering the moving
6 and opposition papers and evidence, and the arguments of counsel, the Court rules as follows:

7 Defendant California Attorney General Xavier Becerra is entitled to judgment on Plaintiff’s
8 Second Amended Complaint, which alleges that California Penal Code sections 26400 *et seq.* and
9 26350 *et seq.*—which regulate the open carry of unloaded firearms within California—are
10 unconstitutional on their face because they violate the First and Second Amendments to the U.S.
11 Constitution, and the Equal Protection Clause of the U.S. Constitution.

12 California’s restrictions on unloaded open carry do not violate the First Amendment
13 because, on their face, they regulate nonexpressive conduct, not speech or expressive conduct;
14 and even if expression were involved, California’s restrictions would survive scrutiny.

15 California’s restrictions on unloaded open carry do not violate the Second Amendment
16 because using *unloaded* firearms for the purpose of amplifying a protest is conduct that has not
17 traditionally fallen within the protection of the Second Amendment, the core of which is armed
18 self-defense of “hearth and home”; and even if it did, California’s restrictions would be justified
19 based on California’s strong interests in public safety, including in preventing violent encounters
20 and the diversion of law enforcement resources to unloaded open carry situations.

21 California’s restrictions on unloaded open carry do not violate the Equal Protection Clause
22 because the statutory exceptions to the general prohibition are rationally related to the purposes
23 underlying the general prohibition.

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1 In view of the foregoing, the motion of Defendant California Attorney General Xavier
2 Becerra for summary judgment herein is GRANTED. Judgment shall henceforth issue.

3 IT IS SO ORDERED.

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5 Dated: _____

6 Hon Richard G. Seeborg
7 United States District Judge
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